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STATUTORY INSTRUMENTS

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**2018 No. 1078**

**The Proceeds of Crime Act 2002 (External Investigations and External Orders and Requests) (Amendment) Order 2018**

**PART 2**

External investigations: amendments to the 2013 Order

**CHAPTER 3**

External investigations: amendments for Scotland

**Scope of Part 2**

**12.** In article 37 (scope of Part 2)—

- (a) omit paragraph (5);
- (b) in paragraph (6)(a), after “disclosure orders” insert “, unexplained wealth orders and interim freezing orders,”.

**Unexplained wealth orders (Scotland)**

**13.** After article 46 (supplementary) insert—

**“Unexplained wealth orders**

**46A.**—(1) The Court of Session may, on an application made by the Scottish Ministers, make an unexplained wealth order in respect of any property if the court is satisfied that each of the requirements for making the order is fulfilled.

(2) An application for the order must—

- (a) specify or describe the property in respect of which the order is sought, and
- (b) specify the person in Scotland whom the Scottish Ministers think holds the property (“the respondent”).

(3) An unexplained wealth order is an order requiring the respondent to provide a statement—

- (a) setting out the nature and extent of the respondent’s interest in the property in respect of which the order is made,
- (b) explaining how the respondent obtained the property (including, in particular, how any costs incurred in obtaining it were met),
- (c) where the property is held by the trustees of a settlement, setting out such details of the settlement as may be specified in the order, and
- (d) setting out such other information in connection with the property as may be so specified.

- (4) The order must specify—
- (a) the form and manner in which the statement is to be given,
  - (b) the person to whom it is to be given, and
  - (c) the place at which it is to be given or, if it is to be given in writing, the address to which it is to be sent.
- (5) The order may, in connection with requiring the respondent to provide the statement mentioned in paragraph (3), also require the respondent to produce documents of a kind specified or described in the order.
- (6) The respondent must comply with the requirements imposed by an unexplained wealth order within whatever period the court may specify (and different periods may be specified in relation to different requirements).
- (7) For the purposes of this article and article 46B (requirements for making of unexplained wealth order), property is held by a person if that person holds an interest in it (see also article 46G (holding of property: trust and company arrangements etc.)).

#### **Requirements for making of unexplained wealth order**

- 46B.**—(1) These are the requirements for the making of an unexplained wealth order in respect of any property.
- (2) The Court of Session must be satisfied that there is reasonable cause to believe that—
- (a) the respondent holds the property, and
  - (b) the value of the property is greater than that of the sum for the time being specified in section 396B(2)(b) of the Proceeds of Crime Act 2002<sup>(1)</sup> (requirements for making of unexplained wealth order).
- (3) The Court of Session must be satisfied that there are reasonable grounds for suspecting that the known sources of the respondent’s lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property.
- (4) The Court of Session must be satisfied that—
- (a) the respondent is a politically exposed person, or
  - (b) there are reasonable grounds for suspecting that—
    - (i) the respondent is, or has been, involved in serious crime (whether in Scotland or elsewhere), or
    - (ii) a person connected with the respondent is, or has been, so involved.
- (5) It does not matter for the purposes of paragraph (2)(a)—
- (a) whether or not there are other persons who also hold the property;
  - (b) whether the property was obtained by the respondent before or after the coming into force of this article.
- (6) For the purposes of paragraph (3)—
- (a) regard is to be had to any heritable security, charge or other kind of security that it is reasonable to assume was or may have been available to the respondent for the purpose of obtaining the property;
  - (b) it is to be assumed that the respondent obtained the property for a price equivalent to its market value;

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<sup>(1)</sup> Section 396B was inserted by section 4 of the Criminal Finances Act 2017.

- (c) income is “lawfully obtained” if it is obtained lawfully under the laws of the country from where the income arises;
  - (d) “known” sources of the respondent’s income are the sources of income (whether arising from employment, assets or otherwise) that are reasonably ascertainable from available information at the time of the making of the application for the order;
  - (e) where the property is an interest in other property comprised in a settlement, the reference to the respondent obtaining property is to be taken as if it were a reference to the respondent obtaining direct ownership of such share in the settled property as relates to, or is fairly represented by, that interest.
- (7) In paragraph (4)(a), “politically exposed person” has the same meaning as for the time being specified in section 396B of the Proceeds of Crime Act 2002.
- (8) For the purposes of this article—
- (a) a person is involved in serious crime in Scotland or elsewhere if the person would be so involved for the purposes of Part 1 of the Serious Crime Act 2007 (see in particular section 2A of that Act) (involvement in serious crime: Scotland orders);
  - (b) section 1122 of the Corporation Tax Act 2010(2) (“connected” persons) applies in determining whether a person is connected with another.
- (9) Where the property in respect of which the order is sought comprises more than one item of property, the reference in paragraph (2)(b) to the value of the property is to the total value of those items.

#### **Non-compliance with an unexplained wealth order**

**46C.**—(1) This article applies in a case where the respondent fails, without reasonable excuse, to comply with the requirements imposed by an unexplained wealth order in respect of any property before the end of the response period.

(2) For the purposes of paragraph (1) where an unexplained wealth order imposes more than one requirement on the respondent, the respondent is to be taken to have failed to comply with the requirements imposed by the order unless each of the requirements is complied with or is purported to be complied with.

(3) In the event of a failure by the respondent to comply with the requirements of an unexplained wealth order, the Scottish Ministers must inform the Secretary of State of that failure and whether an interim freezing order has effect in relation to the property (see article 46I (unexplained wealth order: application for interim freezing order)).

(4) The Secretary of State must—

- (a) inform the requesting party of the non-compliance with the unexplained wealth order, and
- (b) if an interim freezing order has effect in relation to the property, inform the requesting party that the interim freezing order will cease to have effect on the expiry of 28 days beginning with the day after the day with which the response period ends.

(5) In this article—

“requesting party” means the overseas authority that requested assistance with the external investigation in question;

“response period” means the period specified by the court in accordance with article 46A(6) (period specified for complying with the order).

### **Compliance or purported compliance with an unexplained wealth order**

**46D.**—(1) This article applies if—

- (a) before the end of the response period, the respondent complies, or purports to comply, with the requirements imposed by an unexplained wealth order in respect of any property in relation to which the order was made; and
- (b) an interim freezing order has effect in relation to the property (see article 46I (unexplained wealth order: application for interim freezing order)).

(2) In this article “compliance material” means—

- (a) any statement given in compliance or purported compliance with an unexplained wealth order, and
- (b) any document produced in compliance, or purported compliance, with a requirement included in the order by virtue of article 46A(5) (provision of documents);

and compliance material is “provided” when it is given or produced as required by the order.

(3) The Scottish Ministers must give the Secretary of State a copy of the compliance material which has been provided, and inform the Secretary of State of the date upon which the compliance material was provided.

(4) The Secretary of State must—

- (a) inform the requesting party of the compliance, or purported compliance, with the unexplained wealth order,
- (b) supply the requesting party with a copy of the compliance material, and
- (c) inform the requesting party that the interim freezing order will cease to have effect on the expiry of 120 days beginning with the day after the day on which the compliance material was provided to the person to whom the order required it to be given.

(5) If the compliance material is not all provided at the same time, it is to be regarded as provided when the last of that material is provided.

### **Statements**

**46E.**—(1) A statement made by a person in response to a requirement imposed by an unexplained wealth order may not be used in evidence against that person in criminal proceedings.

(2) Paragraph (1) does not apply—

- (a) in the case of proceedings under Part 3 of the Proceeds of Crime Act 2002 (confiscation: Scotland),
- (b) in the case of proceedings under Part 3 of Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (giving effect in Scotland to external requests in connection with criminal investigations or proceedings and to external orders arising from such proceedings),
- (c) on a prosecution for perjury, or
- (d) on a prosecution for some other offence where, in giving evidence, the person makes a statement inconsistent with the statement mentioned in paragraph (1).

- (3) A statement may not be used by virtue of paragraph (2)(d) against a person unless—
- (a) evidence relating to it is adduced, or
  - (b) a question relating to it is asked,
- by the person or on the person's behalf in proceedings arising out of the prosecution.

**Disclosure of information, copying of documents etc.**

**46F.**—(1) An unexplained wealth order does not confer the right to require a person to answer any question, provide any information or produce any document which the person would be entitled to refuse to answer, provide or produce on the grounds of legal privilege.

(2) An unexplained wealth order has effect in spite of any restriction on the disclosure of information (however imposed).

(3) The Scottish Ministers may take copies of any documents produced by the respondent in connection with complying with such a requirement.

(4) Documents so produced may also be retained for so long as it is necessary to retain them (as opposed to a copy of them) in connection with an external investigation in relation to the property in respect of which the unexplained wealth order is made.

(5) But if the Scottish Ministers have reasonable grounds to believe that the documents—

- (a) may need to be produced for the purposes of any legal proceedings, and
- (b) might otherwise be unavailable for those purposes,

they may be retained until the proceedings are concluded.

(6) Unless article 46D (compliance or purported compliance with an unexplained wealth order) applies, an enforcement authority which has been provided with compliance material may send the compliance material to the requesting party or to the Secretary of State for forwarding to the requesting party.

**Holding of property: trusts and company arrangements etc.**

**46G.**—(1) This article applies for the purposes of articles 46A (unexplained wealth orders) and 46B (requirements for making of unexplained wealth order).

(2) The cases in which a person (“P”) is to be taken to “hold” property include where—

- (a) P has effective control over the property;
- (b) P is the trustee of a settlement in which the property is comprised;
- (c) P is a beneficiary (whether actual or potential) in relation to such a settlement.

(3) A person is to be taken to have “effective control” over property if, from all the circumstances, it is reasonable to conclude that the person—

- (a) exercises,
- (b) is able to exercise, or
- (c) is entitled to acquire,

direct or indirect control over the property.

(4) Where a person holds property by virtue of paragraph (2) references to the person obtaining the property are to be read accordingly.

(5) References to a person who holds or obtains property include any body corporate, whether incorporated or formed under the law of a part of the United Kingdom or in a country or territory outside the United Kingdom.

### Supplementary

**46H.**—(1) An application for an unexplained wealth order may be made without notice.

(2) Provision may be made by rules of court as to the discharge and variation of unexplained wealth orders.

(3) An application to discharge or vary an unexplained wealth order may be made to the Court of Session by—

- (a) the Scottish Ministers, or
- (b) any person affected by the order.

(4) The Court of Session may—

- (a) discharge the order, or
- (b) vary the order.”.

### Interim freezing orders (Scotland)

**14.** After article 46H (supplementary) of the 2013 Order (which is inserted by article 13 (unexplained wealth orders: Scotland)) insert—

#### “Unexplained wealth order: application for interim freezing order

**46I.**—(1) This article applies where the Court of Session makes an unexplained wealth order in respect of any property.

(2) The court may make an interim freezing order in respect of the property if the court considers it necessary to do so for the purposes of avoiding the risk of any external order (within the meaning of section 447(2) of the Proceeds of Crime Act 2002 (interpretation)) that might subsequently be obtained being frustrated.

(3) An interim freezing order is an order that prohibits the respondent to the unexplained wealth order, and any other persons with an interest in the property, from in any way dealing with the property (subject to any exclusions under article 46K (exclusions)).

(4) An interim freezing order—

- (a) may be made only on the application of the Scottish Ministers;
- (b) may be made only in order to give effect to an external request (within the meaning of section 447(1) of the Proceeds of Crime Act 2002);
- (c) must be made in the same proceedings as those in which the unexplained wealth order is made, and
- (d) may be combined in one document with the unexplained wealth order.

(5) If an application for an unexplained wealth order in respect of property is made without notice, an application for an interim freezing order in respect of the property must also be made without notice.

#### Variation and discharge of interim freezing order

**46J.**—(1) The Court of Session may at any time vary or discharge an interim freezing order.

(2) The Court of Session must discharge an interim freezing order, so far as it has effect in relation to property, in each of the following two cases.

(3) The first case is where—

- (a) the applicable period has ended, and

- (b) a relevant application has not been made before the end of that period in relation to the property concerned.
- (4) The second case is where—
  - (a) a relevant application has been made before the end of the applicable period in relation to the property concerned, and
  - (b) proceedings on the application (including on any appeal) have been determined or otherwise disposed of.
- (5) The “applicable period” means—
  - (a) in a case where the respondent complies, or purports to comply, with the requirements imposed by an unexplained wealth order before the end of the response period, the period of 120 days beginning with the day after the day upon which the compliance material was provided to the enforcement authority (see article 46D(2) (provision of compliance material), and
  - (b) in any other case, the period of 28 days beginning with the day after the day with which the response period ends.
- (6) In calculating the period of 48 hours for the purposes of paragraph (5), no account is to be taken of—
  - (a) any Saturday or Sunday,
  - (b) Christmas Day,
  - (c) Good Friday,
  - (d) any day which is a bank holiday under the Banking and Financial Dealings Act 1971 in Scotland.
- (7) Before exercising the power under this article to vary or discharge an interim freezing order, the court must (as well as giving the parties to the proceedings an opportunity to be heard) give an opportunity to any person who may be affected by its decision to be heard.
- (8) Paragraph (7) does not apply where the court is acting as required by paragraph (2).
- (9) In this article, “relevant application” means an application for—
  - (a) a restraint order under article 58 of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (restraint orders), or
  - (b) a prohibition order under Part 4B of that Order (giving effect in Scotland to external requests by means of civil proceedings).

### **Exclusions**

- 46K.—**(1) The power to vary an interim freezing order includes (amongst other things) power to make exclusions as follows—
- (a) power to exclude property from the order, and
  - (b) power, otherwise than by excluding property from the order, to make exclusions from the prohibition on dealing with the property to which the order applies.
- (2) Exclusions from the prohibition on dealing with the property to which the order applies (other than exclusions of property from the order) may also be made when the order is made.
- (3) An exclusion may (amongst other things) make provision for the purpose of enabling any person—
- (a) to meet the person’s reasonable living expenses, or
  - (b) to carry on any trade, business, profession or occupation.

- (4) An exclusion may be subject to conditions.
- (5) An exclusion may not be made for the purpose of enabling any person to meet any legal expenses in respect of proceedings under this Part.
- (6) If excluded property is not specified in the order it must be described in the order in general terms.

#### **Restrictions on proceedings and remedies**

- 46L.**—(1) While an interim freezing order has effect the Court of Session may sist any action, execution or other legal process in respect of the property to the order applies.
- (2) If a court (whether the Court of Session or any other court) in which proceedings are pending in respect of any property is satisfied that an interim freezing order has been applied for or made in respect of the property, it may—
- (a) sist the proceedings, or
  - (b) allow them to continue on any terms it thinks fit.
- (3) Before exercising a power conferred by this article, the court must (as well as giving the parties to any proceedings an opportunity to be heard) give an opportunity to any person who may be affected by the court’s decision to be heard.

#### **Arrestment of property affected by interim freezing order**

- 46M.**—(1) On the application of the Scottish Ministers the Court of Session may, in relation to moveable property to which an interim freezing order applies (whether generally or to such of it as is specified in the application), grant warrant for arrestment.
- (2) An application under paragraph (1) may be made at the same time as the application for the interim freezing order or at any time afterwards.
- (3) A warrant for arrestment may be granted only if the property would be arrestable if the person entitled to it were a debtor.
- (4) A warrant under paragraph (1) has effect as if granted on the dependence of an action for debt at the instance of the Scottish Ministers against the person and may be executed, recalled, loosed or restricted accordingly.
- (5) An arrestment executed under this article ceases to have effect when, or in so far as, the interim freezing order ceases to apply in respect of the property in relation to which the warrant for arrestment was granted.
- (6) If an arrestment ceases to have effect to any extent by virtue of paragraph (5), the Scottish Ministers must apply to the Court of Session for an order recalling or, as the case may be, restricting the arrestment.

#### **Inhibition of property affected by interim freezing order**

- 46N.**—(1) On the application of the Scottish Ministers, the Court of Session may, in relation to the property mentioned in paragraph (2), grant warrant for inhibition against any person specified in an interim freezing order.
- (2) The property is heritable property situated in Scotland to which the interim freezing order applies (whether generally or to such of it as is specified in the application).
- (3) The warrant for inhibition—
- (a) has effect as if granted on the dependence of an action for debt by the Scottish Ministers against the person and may be executed, recalled, loosed or restricted accordingly, and



(b) has the effect of letters of inhibition and must forthwith be registered by the Scottish Ministers in the register of inhibitions and adjudications.

(4) Section 155 of the Titles to Land Consolidation (Scotland) Act 1868<sup>(3)</sup> (effective date of inhibition) applies in relation to an inhibition for which warrant is granted under paragraph (1) as it applies to an inhibition by separate letters or contained in a summons.

(5) An inhibition executed under this section ceases to have effect when, or in so far as, the interim freezing order ceases to apply in respect of the property in relation to which the warrant for inhibition was granted.

(6) If an inhibition ceases to have effect to any extent by virtue of paragraph (5), the Scottish ministers must—

- (a) apply for the recall or, as the case may be, the restriction of the inhibition, and
- (b) ensure that the recall or restriction is reflected in the register of inhibitions and adjudications.

### **Receivers in connection with interim freezing orders**

**46O.**—(1) This article applies where the Court of Session makes an interim freezing order on an application by the Scottish Ministers.

(2) The Court of Session may, on an application by the Scottish Ministers, by order appoint a receiver in respect of any property to which the interim freezing order applies.

(3) An application under paragraph (2) may be made at the same time as the application for the interim freezing order or at any time afterwards.

(4) The application may be made without notice if the circumstances of the case are such that notice of the application would give rise to a risk of any external order that might subsequently be obtained being frustrated.

(5) In its application the Scottish Ministers must nominate a suitably qualified person for appointment as a receiver.

(6) The person nominated may be a member of staff of the Scottish Ministers.

### **Powers of receivers appointed under article 46O**

**46P.**—(1) If the Court of Session appoints a receiver under article 46O (receivers in connection with interim freezing orders), the court may act under this article on the application of the Scottish Ministers.

(2) The court may by order authorise or require the receiver—

- (a) to manage any property in respect of which the receiver is appointed;
- (b) to take any other steps the court thinks appropriate in connection with the management of any such property (including securing the detention, custody or preservation of the property in order to manage it).

(3) Managing property includes—

- (a) selling or otherwise disposing of assets comprised in the property which are perishable or which ought to be disposed of before their value diminishes;
- (b) where the property comprises assets of a trade or business, carrying on, or arranging for another to carry on, the trade or business;
- (c) incurring capital expenditure in respect of the property.

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(3) 1868 c. 101 (31 & 32 Vict). Section 155 was amended by section 98(1) and (2) of the Criminal Justice (Scotland) Act 1995 (c. 20), and by section 149 of the Bankruptcy & Diligence etc. (Scotland) Act 2007 (asp 3).

(4) The court may by order require any person in respect of whose property the receiver is appointed—

- (a) to bring the property to a place in Scotland specified by the receiver or to place it in the custody of the receiver (if in either case the person is able to do so);
- (b) to do anything the person is reasonably required to do by the receiver for the preservation of the property.

(5) The court may by order require any person in respect of whose property the receiver is appointed to bring any documents relating to the property which are in the person's possession or control to a place in Scotland specified by the receiver or to place them in the custody of the receiver.

(6) In paragraph (5) "document" means anything in which information of any description is recorded.

(7) Any prohibition on dealing with property imposed by an interim freezing order does not prevent a person from complying with any requirements imposed by virtue of this article.

(8) Paragraph (9) applies in a case where—

- (a) the receiver deals with property that is not property in respect of which the receiver was appointed under article 46O, but
- (b) at the time of dealing with the property the receiver believed on reasonable grounds that they were entitled to do so by virtue of being appointed under article 46O.

(9) The receiver is not liable to any person in respect of any loss or damage resulting from the receiver's dealing with the property.

(10) But paragraph (9) does not apply to the extent that the loss or damage is caused by the receiver's negligence.

#### **Supervision of article 46O receiver and variations**

**46Q.**—(1) Any of the following persons may at any time apply to the Court of Session for directions as to the exercise of the functions of a receiver appointed under article 46O (receivers in connection with interim freezing orders)—

- (a) the receiver;
- (b) a party to the proceedings for the appointment of the receiver or the interim freezing order concerned;
- (c) a person affected by an action taken by the receiver;
- (d) a person who may be affected by an action proposed to be taken by the receiver.

(2) Before it gives directions under paragraph (1) the court must give an opportunity to be heard to—

- (a) the receiver;
- (b) the parties to the proceedings for the appointment of the receiver and for the interim freezing order concerned;
- (c) a person who may be interested in the application under paragraph (1).

(3) The court may at any time vary or discharge—

- (a) the appointment of a receiver under article 46O,
- (b) an order under article 46P (powers of receivers appointed under article 46O), or
- (c) directions under this article.

(4) Before exercising a power under paragraph (3) the court must give an opportunity to be heard to—

- (a) the receiver;
- (b) the parties to the proceedings for the appointment of the receiver, for the order under article 46O or (as the case may be) for the directions under this article;
- (c) the parties to the proceedings for the interim freezing order concerned;
- (d) any person who may be affected by the court’s decision.

### **Compensation**

**46R.**—(1) Where an interim freezing order in respect of any property is recalled, the person to whom the property belongs may make an application to the Court of Session for the payment of compensation.

(2) The application must be made within the period of three months beginning with the recall of the interim freezing order.

(3) The court may award compensation to be paid to the applicant only if satisfied that—

- (a) the applicant has suffered loss as a result of the making of the interim freezing order,
- (b) there has been a serious default on the part of the Scottish Ministers in applying for the order, and
- (c) the order would not have been made had the default not occurred.

(4) Where the court orders the payment of compensation—

- (a) the compensation is payable by the Scottish Ministers, and
- (b) the amount of the compensation to be paid is the amount that the court thinks reasonable, having regard to the loss suffered and any other relevant circumstance.”.

### **Amendments consequential on Articles 13 and 14**

**15.** In article 36 (interpretation of Part 2), after paragraph (8) insert—

“(9) “Settlement” (in relation to unexplained wealth orders and interim freezing orders) has the meaning given by section 620 of the Income Tax (Trading and Other Income) Act 2005.

(10) For the purposes of this Part—

“external request” has the same meaning as in article 46I (unexplained wealth order: application for interim freezing order);

“interim freezing order” has the same meaning as in article 46I;

“requesting party” has the same meaning as in article 46C(5) (non-compliance with an unexplained wealth order);

“respondent” has the same meaning as in article 46A(2)(b) (unexplained wealth orders);

“response period” has the same meaning as in article 46C(5);

“unexplained wealth order” has the same meaning as in article 46A (unexplained wealth orders: Scotland).”.

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**Status:** This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

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